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IN THE

# Supreme Court of the United States

Supreme Court, U. S.
FILED
APR 10 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

No. 71-5139

GENE HAM, PETITIONER,

*versus*

STATE OF SOUTH CAROLINA, RESPONDENT

## BRIEF OF RESPONDENT

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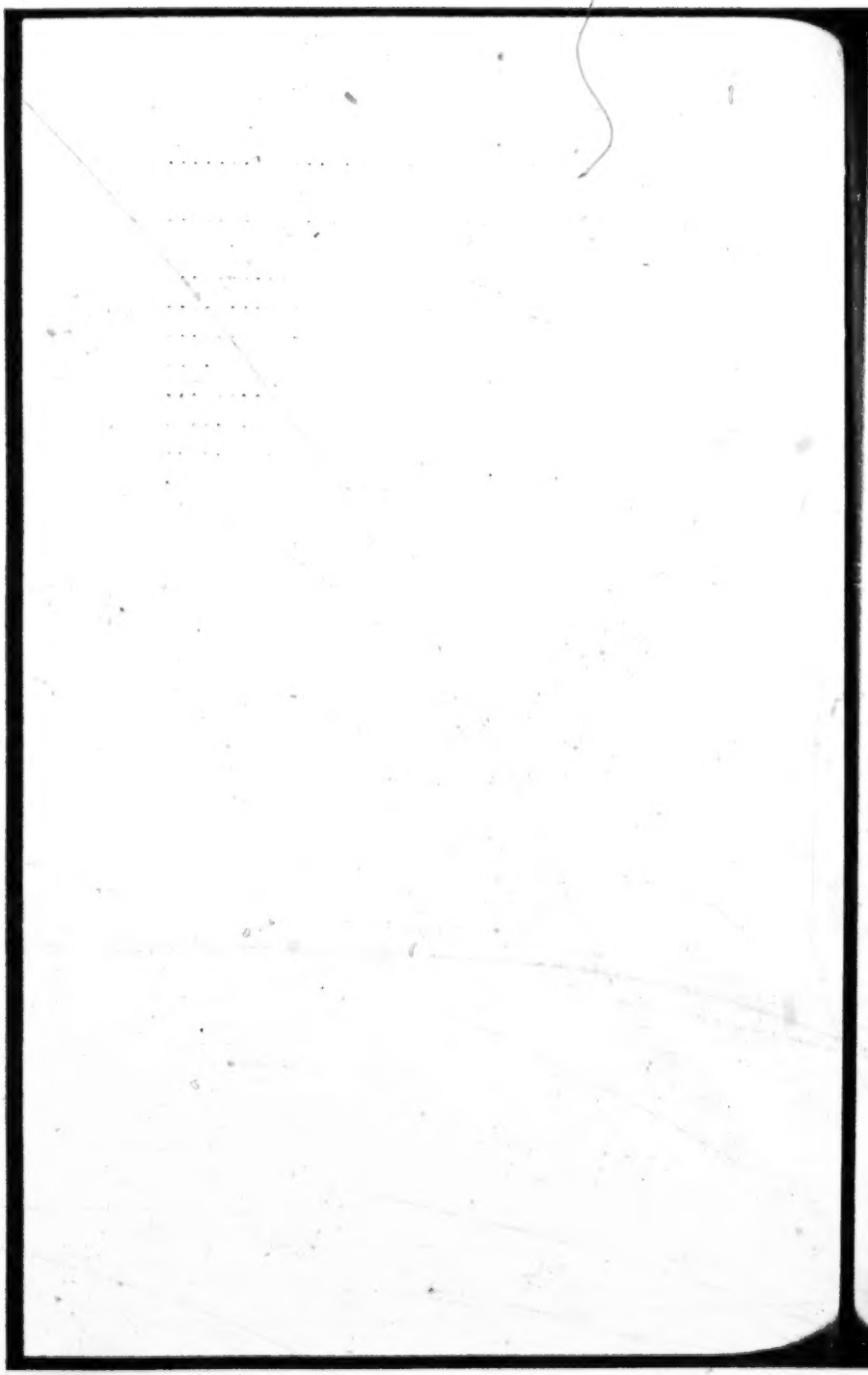

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### ARGUMENT

**The Trial Judge's Refusal to Examine the Jurors on Voir Dire as to Whether the Petitioner's Race or Pretrial Publicity Would Affect Their Ability to Render a Fair Verdict Was Not Violative of the Petitioner's Right to an Impartial Jury as Guaranteed by the Sixth and Fourteenth Amendments to the Constitution.**

The guarantees of the Sixth Amendment as applied to the states through the Fourteenth provide that a criminal defendant shall have the right to a public trial by an impartial jury of the state and district wherein the crime

shall have been committed. This right of trial by jury cannot guarantee trial by a perfect jury, if such could exist, but only an impartial jury, one which favors neither party, is unprejudiced, disinterested, equitable, and just, and is composed of jurors who have not prejudged the merits of the case. *Shaver v. State,* 162 Tex. Crim. R. 15, 280 S. W. (2d) 740; *De La Rosa v. State,* Tex. Crim. App., 414 S. W. (2d) 668, 671; *People v. Straton,* 13 Mich. App. 350, 164 N. W. (2d) 555. The impartiality of jurors is insured by a selection process which involves no systematic and intentional exclusion of any group and an indiscriminate drawing therefrom. 47 *Am. Jur.* (2d) *Jury,* Section 164 at 758; *Hoyt v. Florida,* 368 U. S. 57 (1961); *Fay v. New York,* 332 U. S. 261 (1947). The State of South Carolina, while adhering to the above, provides a further method of insuring the impartiality of jurors through the provisions of Section 38-211, Code of Laws of South Carolina, 1962, which grants peremptory challenges in all criminal cases;* and challenges for cause available through the provisions of Article 1, Section 18 and Article 4, Section 22 of the South Carolina Constitution. The Trial Judge is charged by law to insure that each juror is qualified, unbiased, fair, and impartial. *State v. Rasor,* 168 S. C. 221, 167 S. E. 396, and questions as to a juror's fitness are directed to his discretion, *State v. Woods,* 189 S. C. 281, 1 S. E. (2d) 190, and the exercise of such discretion will not be disturbed on appeal in the absence of a showing of abuse thereof. *State v. Hyde,* 90 S. C. 296, 73 S. E. 180. The Trial Judge is further charged by law, Section 38-202, Code of Laws of South

* "Section 38-211 of the South Carolina Code of Laws for 1962 gives to the State five and to the defendant ten peremptory challenges. These may be used for any cause satisfactory to counsel or for no cause, and it is not the province of the Trial Judge or this Court to interfere." *State v. Richburg,* 250 S. C. 451, 158 S. E. (2d) 769. As is hereby shown, the statutory provisions guarantee varying numbers of peremptory challenges, according to the offense, and the exercise thereof is solely within the discretion of the challenging party.

Carolina, 1962, on motion of either party in the suit, to examine on oath any person, who is called as a juror therein, to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein. The party objecting to the juror may introduce competent evidence in support of his objection, and should the Court find the juror not indifferent to the cause, he shall be set aside.

In the instant case the Trial Judge refused to make the specific inquiries sought by defense counsel but made the more general inquiries as set forth in Section 38-202 (*supra*). There being no objection by the defense to any particular juror and no evidence being presented to establish bias or prejudice on the part of any juror (A., 35-48), it appears clear that the burden of establishing prejudice was not successfully born by the objecting party. This failure was sought to be excused on the grounds that the refusal of the Trial Judge to ask the proffered questions on *voir dire* prevented the defense from making a meaningful challenge for cause. Neither now nor then was there any showing that any juror was prejudiced against the defendant because of his race, and there was no showing whatsoever of prejudicial pretrial publicity. The only allegation of such publicity was made pursuant to a motion for a change of venue and continuance (A., 11-12), at which time the Trial Judge found the proffered exhibits not prejudicial as they did not refer to the defendant or the case (A., 12).

It is the contention of the State that the general statutory inquiries made by the Trial Judge sufficiently covered those specific inquiries sought by the defense. The defendant was in Court, within sight of the jury, when the statutory inquiries were made. It was obvious to the jury and all present that the defendant was black and bearded. The

redundancy of asking a prospective juror on his *voir dire*, "Are you conscious of any bias or prejudice for or against him?", "him" being the black, bearded defendant at whom the juror is looking; then to ask, "Are you conscious of any bias or prejudice against black people who wear beards?" would appear to be not only unnecessary but ridiculous.

If the argument of the petitioner is followed to its extreme, there is no proposed question on *voir dire* that could be excluded, as the possibility exists that every question, no matter how remote, could uncover some heretofore concealed bias of a prospective juror. It is for this reason that general questions on *voir dire* have been preferred. *Crawford v. United States,* 41 F. (2d) 979; *Commonwealth v. Lee,* 324 Mass. 714, 88 N. E. (2d) 713. If the general questions are framed in such a manner as to reveal if the defendant's race would prevent the prospective juror from giving the defendant or prosecution a fair and impartial trial, it should be deemed not only sufficient, but again preferred. *United States v. Gore,* 435 F. (2d) 1110; *Crawford v. United States (supra).*

General questions framed in a proper manner could avoid the dilemma in our court system early recognized in the case of *People v. Edwards,* 163 Cal. 752, 753, 127 Pac. 58, which stated:

> The records of the cases appealed to this Court, in which rulings made while impaneling a jury have been involved, indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examination of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and that the supposed privilege of doing so has been greatly abused.

The general questions posed in the instant case, as a factual matter, were sufficient and encomposed those specific inquiries sought by the defense. This contention is established by the fact that two jurors on the statutory *voir dire* indicated that they could not give the defendant a fair and impartial trial or that they did maintain bias or prejudice against him (A., 42, 47). To allege that the specific questions were necessary in addition to those presented is to ignore the facts, and to espouse tactics such as were denounced in *People v. Edwards (supra).*

The law clearly appears to be that the conduct of the *voir dire* examination is within the discretion of the Trial Judge, and the exercise of such discretion will not be disturbed in the absence of an abuse thereof. *Silverthorn v. United States,* 400 F. (2d) 627; *Connors v. United States,* 158 U. S. 408. Not only must the exercise of discretion be abused, the abuse must be of such a degree as to prejudice one of the parties for it to constitute reversible error. *State v. Higgs,* 143 Conn. 138, 120 A. (2d) 152; 47 *Am. Jur.* (2d) *Jury,* Section 177; *State v. Ferraro,* 146 Conn. 59, 147 A. (2d) 478. Again in the instant case, there is no showing of abuse and no showing of prejudice toward the defendant. There is no indication in the record that the defendant was tried other than on the facts, whereupon he was found guilty.

In some jurisdictions in order to establish prejudice, it is necessary that the defendant show that he was compelled to accept an objectionable juror. *Pendergrass v. State,* 121 Tex. Crim. 213, 48 S. W. (2d) 997. This State does not espouse this degree of showing of prejudice, but it is contended there must be some showing other than the mere fact of a guilty verdict. The guilty verdict in the instant case must relate to, and to some degree, be preconditioned upon the refusal of the Trial Judge to offer the proposed questions on *voir dire.* Absent some relation-

ship between the two, the assertion of prejudice is merely speculative and without merit. The instant case does not contain this relationship which is contended to be essential in order to constitute reversible error.

To require the Trial Judge to surrender his discretion and to demand specific questions on *voir dire* relating to the race of a criminal defendant, when general questions covering bias and prejudice have been asked, is to go beyond that requirement of an impartial jury as set forth in the Sixth Amendment and approach the undesirable result of a jury being tailored to fit a particular defendant.

The State agrees that some situations require the Trial Judge to go beyond the general statutory inquiries, but there must be some showing of need by the defense for him to do so. This Court and others have held on innumerable occasions that proposed questions on *voir dire* are properly refused absent a showing of their relationship to the pending case. *Yarborough v. United States,* 230 F. (2d) 56; *State v. Maxwell,* 151 Kan. 951, 102 P. (2d) 109; *State v. Huff,* 14 N. J. 240, 102 A. (2d) 8; *Connors v. United States (supra).* The instant case, involving a drug violation, had no racial overtones which would require specific questions of the nature proposed by the defense. There was no showing of any relation between the questions sought and the offense at hand, and absent such a showing, there was no abuse of discretion on the part of the Trial Judge in refusing such questions. This is particularly so when the general questions asked encompassed the specific ones sought. The right to trial by an impartial jury is just that, not a perfect jury nor one tailored to fit the case, and the defense failing to make a showing of partiality or any inference of such among the jurors fails to require a reversal of this case.

## CONCLUSION

The State concludes that the Trial Judge's refusal to ask the specific questions on *voir dire* was well within the exercise of his discretion, as the general questions submitted to the prospective jurors encompassed the specific ones sought, and no showing of abuse nor resulting prejudice being made, the judgment of the Supreme Court of South Carolina should be upheld.

Respectfully submitted,

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